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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 191

SAMUEL R. MORGAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

LOUIS H. YARRUT,
Counsel for Petitioner.

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To the Honorable the Supreme Court of the United States:

Petitioner, Samuel R. Morgan, respectfully prays that it may please the Court to review by certiorari the judgment of the Circuit Court of Appeals, Fifth Circuit, affirming his conviction and sentence for alleged violation of a price regulation of the Office of Price Administration (R. 349).

Basis of Jurisdiction

Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, §1, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was rendered May 11, 1945, and rehearing denied on June 7, 1945.

Questions Presented

I

Can a conviction be rested upon mere unsigned and unauthenticated, typewritten copies of documents, admitted as evidence over objection, where no explanation is offered for non-production of the originals, and there is no opportunity to cross-examine the author of the undisclosed originals?

II

Can a conviction be rested on evidence, adduced over objection, so materially at variance with the charges specified in a bill of information that accused is never apprised before trial of the charges to be met, is deprived of opportunity to prepare defense, and is denied the constitutional right to be informed of the nature and cause of the accusation against him?

Reasons Relied upon for Allowance of Writ

Affirmance by the Circuit Court of Appeals of petitioner's conviction is so far a departure from the accepted and usual course of judicial proceeding and so far sanctions such a departure by the district court in a matter involving the liberty of petitioner and the proper administration of justice as to call for an exercise of this Court's power of supervision to preserve the integrity of criminal proceedings, and the security of constitutional guarantees.

Argument

I

The prosecution produced a witness who presented two wholly typewritten, unsigned, instruments, purporting to be copies of a ceiling price list filed by the Pure Ice Com-

pany with the Calcasieu Parish War Price and Rationing Board and which the witness testified she found in the Board's files. The prosecution offered, by such instruments, to prove the ceiling prices alleged to have been violated by petitioner. These unauthenticated copies were admitted as evidence over petitioner's objections (R. 57-66), and the Court of Appeals accepted them as full proof of the ceiling prices alleged to have been violated.

Without proof of the established ceiling price there could be no proof of violation.

The witness who produced the unauthenticated copies intended to establish the ceiling price, declared "all of the documents were taken out of the file and they were gone over rather hurriedly from a technical standpoint as to whether they were signed or unsigned and whether they were considered adequate or inadequate" (R. 60).

The witness had no recollection of the filing of the originals of the documents, for the reason that they were received in a separate office from the one in which she was working (R. 62).

These copies were not records made for the systematic conduct of a business as such, so as to fall within the statute of June 20, 1936 (28 U. S. C. A. 695), and they would not have been admissible as evidence even in a civil case. Compare *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477.

No effort was made to produce the original documents and no explanation was offered as to their absence.

Absence of primary evidence must be satisfactorily accounted for before secondary evidence may be received. *Hartzell* v. *U. S.*, 72 F. 2d 569, certiorari denied 293 U. S. 621, 55 S. Ct. 216; *Hass* v. *U. S.*, 93 F. 2d 427.

Petitioner had no opportunity to cross-examine anyone as to the verity of the contents of the original documents, as the copies did not disclose by whom the original was pur-

ported to have been made. Thus he was deprived of his constitutional right of confrontation with witnesses.

(The exhibits referred to were sent to the Court of Appeals in their original form, as filed in evidence. Petitioner will move that the Clerk of the Court of Appeals be directed to transmit them to the Clerk of this Honorable Court in the same form, to be incorporated as part of this record.)

II

The bill of information on which petitioner was prosecuted charges him jointly with others with having sold ice at Lake Charles, Louisiana, for a price in excess of the maximum price as fixed by regulation of the Office of Price Administration (R. 2-43).

There was no notice to petitioner that he was to be tried on any but that specific misdemeanor. There was no intimation in the bill of information that it was being used as a vehicle to put petitioner on trial for a conspiracy. Petitioner could not surmise, in preparing his defense, that he would have to meet evidence establishing a conspiracy, as he could not be tried on such a charge without the presentment of a grand jury.

On the trial the prosecution abandoned the specific charges and proceeded, over petitioner's objection, to establish overt acts in support of a conspiracy. The Court of Appeals found no objection to this mode of procedure, though it admitted that "the evidence in the trial would have been competent to prove conspiracy" (R. 353).

In refusing a new trial the district judge showed that he was fully aware of the scheme of the prosecution to charge specific offenses by information so as to avoid the necessity for grand jury action, but he deemed such permissible. Said he:

> "It is true that the indictment simply charges the sales. It charges all of these parties with the particu-

lar offense of making the sales above the ceiling price. It does not charge a conspiracy. Undoubtedly, if a conspiracy had been charged, then all of these matters could have been presented under a conspiracy charge, and wherever the people were, if they were parties and the jury convinced beyond a reasonable doubt that they were participants in the conspiracy, whether they ever put their foot in the state or not, they could have been convicted of the conspiracy. But the government does not do that. I take it that the main reason was that in order to have a conspiracy count, which is a felony, it would have been necessary to have a grand jury called and an indictment returned, and in view of the various situations from the standpoint of effect upon the community, they chose to file a bill of information under the Act creating the Office of Price Administration and the regulations passed pursuant thereto so that this matter might be speedily disposed of'' (R. 328).

Fundamental rules of justice require that an offense be charged with precision and certainty, and that even in the case of misdemeanors the information be free from ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. *Ledbetter* v. *U. S.*, 170 U. S. 606, 18 S. Ct. 774.

The proof adduced on the trial departed so deliberately and substantially from the charge as made in the bill of information that petitioner was completely and effectively misled in his attempt to defend himself, and such material variance violated petitioner's constitutional right to be informed of the nature and cause of the accusation against him. *Guilbeau* v. *U. S.*, 288 F. 733 (C. C. A. La.).

Conclusion

WHEREFORE, for the foregoing reasons, petitioner, Samuel R. Morgan, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals

for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully,

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(9099)

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In the Supreme Court of the United States

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SAMUEL R. MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 349–355) is reported at 149 F. 2d 185.

JURISDICTION

The judgment of the circuit court of appeals was entered May 11, 1945 (R. 355), and a petition for rehearing (R. 356–359) was denied June 7, 1945 (R. 360). The petition for a writ of certiorari was filed July 2, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in admitting certain documentary evidence.

2. Whether there was a fatal variance between the information and the evidence adduced in support thereof.

STATUTORY AND OTHER PROVISIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 (56 Stat. 23, 28, 33; 50 U. S. C. App., Supp. IV, 904 (a), 925 (b)) are as follows:

> SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.
>
> SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act, * * * shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not

more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

The pertinent provisions of Maximum Price Regulation 154, issued May 25, 1942 (7 F. R. 3903–3904),[1] are as follows:

SEC. 1393.1 *Maximum prices for ice.*— On and after May 25, 1942, regardless of any contract, agreement, lease or other obligation, no person shall sell or deliver ice in the course of trade or business at prices higher than the maximum prices set forth in Appendix A hereof, incorporated herein as Sec. 1393.9; and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

* * * * *

SEC. 1393.9 *Appendix A: Maximum prices for ice—(a) Determination of maximum prices—(1) Generally:* The seller's maximum delivered price and the seller's maximum platform price for any form, quantity, and quality of ice shall be the highest price at which the seller delivered such form and quantity and quality of ice during March 1942 on a delivered sale or on a platform sale respectively to a purchaser of the same general class.

* * * * *

[1] In respect of an amendment of this regulation on July 3, 1942, see footnote 5, pp. 5–6, *infra*.

(b) If the maximum price of ice cannot be determined under paragraph (a) of this section, the maximum price of ice shall be the maximum price of the most closely competitive seller of the same class, for the same form, quantity, and quality of ice.

STATEMENT

An information in 54 counts was filed against petitioner, Riley Johnson, John D. Warner, and Raymond H. Burtz in the United States District Court for the Western District of Louisiana, charging them with wilfully making sales of ice in Lake Charles, Louisiana, from May 25, 1944, to July 7, 1944, at prices in excess of those permitted by Maximum Price Regulation 154, issued by the Price Administrator of the Office of Price Administration pursuant to the Emergency Price Control Act of 1942, as amended, and Executive Orders 9250 and 9328 (R. 2–43).[2] After a trial by jury, each of the defendants, except Burtz, was convicted on counts 1 to 39 and 42 to 54 (R. 344). Petitioner was sentenced generally to imprisonment for six months on counts 1 to 5, and imposition of sentence on the remaining counts was suspended, and he was placed on probation for a period of five years to begin at the expiration of the prison sentence (R. 46).[3] On appeal to the

[2] Counts 1–41 related to wholesale sales; counts 42–54 related to retail sales.

Circuit Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed (R. 349–355).[4]

ARGUMENT

1. Petitioner contends (Pet. 2–4) that the trial judge committed reversible error in admitting in evidence, over his objection, Government Exhibit 2, which purported to be the price list filed by Pure Ice and Cold Storage, Inc. with the local O. P. A. office on June 23, 1942, showing the maximum prices which it charged for ice during March 1942 (see R. 60–66).[5] Petitioner asserts

[3] Johnson was sentenced to imprisonment for two months on counts 1 to 5, and probation was granted as to the remaining counts; Warner was sentenced to imprisonment for three months on count 19, and probation was granted as to the remaining counts (R. 346-347).

[4] The sufficiency of the evidence is not directly involved, and we therefore deem it unnecessary to delineate the evidence. It is summarized in the opinion of the circuit court of appeals (R. 351–352, 354). Such of the evidence as is necessary for a consideration of the questions presented by the petition is set forth in the Argument.

[5] Maximum Price Regulation 154 (pp. 3–4, *supra*) was amended July 3, 1942, so as to provide that the maximum prices for ice should be determined by reference to the highest prices charged for ice during April 1942 (7 F. R. 5139–5141, 5276). The Government did not introduce evidence to prove what the April 1942 prices were for the two companies concerned, i. e., Pure Ice and Service Ice. However, at no stage of the proceeding has petitioner made any point of this, and it is evident that the two companies did not charge any more for ice in April 1942 than they charged in March 1942. The

that the document was inadmissible because it was a copy and no effort was made either to produce the original or to account for its absence. The contention is plainly without merit.

The record does not establish that the document was a copy and not the original. The

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record discloses that both Pure Ice and defendant Warner, doing business as Peoples Ice Co., consented to the entry of decrees which enjoined them from selling ice above ceiling prices (R. 189–190, 232, 295, 299). While the records in the injunction cases were not actually offered in evidence in the criminal case, the defendants did state that they had no objection to the introduction of the complaints and judgments in those cases "to show what the issue was" (R. 190–191).

We have examined the complaints and judgments in the injunction cases. They reveal that the cases were instituted in the same court as the criminal prosecution (Civil Actions 868 and 1027), and that Pure Ice was enjoined from selling ice to dealers for resale at prices above its highest April 1942 price of twenty-five cents per 100 pounds. This was the same as its ceiling price for March 1942 (see Gov. Ex. 2, R. 61–66). These records also show that Peoples Ice Company was enjoined from selling ice in excess of the highest April 1942 prices charged for ice by its closest competitor, Service Ice Company, viz., twenty-five cents per 100 pounds to dealers for resale, and forty cents per 100 pounds for home consumption. These prices were the same as the highest prices charged by Service Ice for ice during March 1942 (see Gov. Ex. 3, R. 66). Accordingly, the March and April 1942 prices were identical, except perhaps in respect of the April 1942 price charged by Pure Ice for ice for home consumption. However, petitioner has at no time claimed that Pure Ice's April 1942 price was higher than its March 1942 price, and there is ample evidence in the record that its March 1942 price for ice for home consumption did not change in April (see, e. g., R. 159, 161, 170, 173).

O. P. A. clerk through whom it was offered, testified that it was the original (R. 60). Nor did her cross-examination prove the contrary. There she merely admitted to a mistaken belief that the document was on the letter head of Pure Ice (R. 62), which was apparently only one of the reasons for her belief that the document was an original. Furthermore, it does not appear that petitioner's objection to the admission of the document rested upon the claim that it was secondary evidence. He objected because the document was "not * * * sufficiently identified as coming from the Pure Ice and Cold Storage, Inc." (R. 63), which also appears to have been the basis of his attack in the circuit court of appeals.[6] Since it is settled that the admission of secondary evidence without objection on that score is not erroneous (*Savage* v. *United States*, 270 Fed. 14, 20 (C. C. A. 8), certiorari denied, 257 U. S. 642; *Thompson* v. *United States*, 256 Fed 616, 620–621 (C. C. A. 2), certiorari denied, 249 U. S. 617), it is now of no moment that the document in question may have been a copy.

2. Finally, petitioner contends (Pet. 2, 4–5) that there was a fatal variance between the offenses charged and the proof adduced by the Government in support of those charges, since the information charged petitioner and his codefend-

[6] That court properly held that there was no merit to the point for the reason that the "evidence sufficiently established the identity of the price list and its authenticity" (R. 354).

ants with substantive violations of the Emergency Price Control Act, while the evidence showed a conspiracy to violate the Act. We submit that there is no merit in this contention.

The information alleged that the defendants jointly committed the violations charged (R. 2–43). While it may be, as stated by the circuit court of appeals, that "the evidence introduced in the trial would have been competent to prove conspiracy" (R. 353), it was also admissible to prove the joint action of defendants.[7] Where persons are associated for a criminal purpose, acts done by any of them with reference to such purpose are admissible, although no conspiracy is charged. *Coplin* v. *United States,* 88 F. 2d 652 (C. C. A. 9), certiorari denied, 301 U. S. 703; *Cossack* v. *United States,* 82 F. 2d 214, 216 (C. C. A. 9), certiorari denied, 298 U. S. 654; *Samich* v. *United States,* 22 F. 2d 672 (C. C. A. 9).

While petitioner suggests (Pet. 4, 5) that he was prejudiced by the fact that the information did not charge a conspiracy, it is plain that there is no basis for the claim. As pointed out by the court below, "No bill of particulars was requested, much evidence was introduced by [petitioner] contrary to and in rebuttal of that of the Government, and [petitioner] makes no contention here

[7] The theory of the Government's case was that defendant Warner and Johnson who were directly implicated in the illegal sales were acting at the behest of petitioner (see R. 352–353).

that he was deprived of evidence otherwise available to him because the bill of information failed to apprise him of the nature of the Government's case" (R. 353–354).

CONCLUSION

The case was decided below in accordance with well-established principles, and there is no conflict of decisions involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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AUGUST 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945